Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

OZ OPTICS, LTD.,

Petitioner,

v.

DIMENSIONAL COMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PETER A. OUDA
PETER A. OUDA, LLC
19 North Bridge Street
Somerville, NJ 08876
(908) 953-9300

Attorneys for Petitioner

198233

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The Third Circuit affirmed the District Court's order denying leave to file a counterclaim because the motion was filed after the deadline in the Pretrial scheduling Order for amendment of pleadings; the Magistrate Judge found, and the District Judge affirmed, that Petitioner failed to establish "good cause" under Fed. R. Civ. Proc. 16(b) for the extension of a deadline. The "good cause" requirement was employed to override the standard of Fed. R. Civ. Proc. 13 (f) permitting a party to assert a compulsory counterclaim when the failure to do so previously was the result of inadvertence or excusable neglect or when the interests of justice require allowing the counterclaim to be asserted. Further, the good cause requirement for an extension of a Pretrial Scheduling Order deadline overshadowed the mandate of Fed. R. Civ. Proc. 15 (a) that leave to amend the pleadings is to be freely given when the interests of justice require.

The counterclaim Petitioner was denied the ability to assert was related to the affirmative defense asserted of setoff\recoupment, based on the Plaintiff resorting to self help and wrongfully seizing and retaining possession of property the Petitioner paid for and rightfully owned. The seizure of Petitioner's property was based on his refusal to pay for extra contractual charges that were never disclosed to nor authorized or approved by Petitioner. The District Court failed to charge the jury on the law governing self help, thus leaving the jury utterly without guidance on the law to apply to the undisputed facts established by the evidence, i.e., that the Plaintiff seized and retained control of Petitioner's property, causing Petitioner to incur additional expenses to replace the wrongfully seized and retained property. Not surprisingly, without knowing the relevant law to guide its analysis of the evidence, the jury

concluded that the Petitioner was not entitled to relief on the defense\claim for setoff\recoupment.

The Plaintiff sought recovery for multiple categories of extra contractual charges and expenses, and as the evidence for each of the categories of charges and expenses varied, the jury was required to individually weigh the evidence for each category of damages sought by the Plaintiff. However, the District Court used a general verdict form which allowed the jury to award a "lump sum" verdict, without any delineation of what expenses and charges the jury concluded, based on the evidence, the Plaintiff was entitled to recover. This is significant, because the Plaintiff sought a total of $534,810.92 but the jury returned a verdict of $492,766.01 as damages. The general verdict form makes it impossible to discern what categories of charges and expenses sought were allowed or disallowed by the jury, thus depriving Petitioner of effective and meaningful appellate review of the damages verdict.

The questions presented are:

1. Whether Fed. R. Civ. Proc. 16(b) requiring good cause for the extension of the deadline in a Pretrial Scheduling Order applies to a Motion to Amend the pleadings t. assert a compulsory counterclaim, or if instead the Motion to Amend is governed solely by the interests of justice standard of Fed. R. Civ. Proc. 13 (f) and the liberal standard for amendment of pleadings under Fed. R. Civ. Proc. 15(a)?

2. Whether the failure to charge the jury on the applicable law that governs the jury's assessment of the factual evidence, resulting in the jury disregarding undisputed testimony that supported the defense to a breach of contract claim, warrants granting a new trial?

3. Whether in a case in which the Plaintiff seeks recovery for multiple categories of extra contractual charges, the evidence for which varies for each category of charges, the failure to utilize a specific verdict form, thus precluding appellate review of the adequacy of the evidence, requires granting a new trial?

CORPORATE DISCLOSURE STATEMENT

Petitioner Oz Optics Ltd. has no parent company and no publicly held company owns 10 percent or more of the corporation's stock.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is dated August 12, 2005. (Appendix A). By Order dated September 13, 2005, the United States Court of Appeals for the Third Circuit denied the Petition for Rehearing. (Appendix H). The Third Circuit affirmed the decision of the United States District Court for the District of New Jersey dated October 9, 2003 (Appendix E), in which the District Judge affirmed the Order dated July 15, 2003, in which the Magistrate Judge denied the Defendant leave to file a counterclaim (Appendix G). The Third Circuit also affirmed the decision of the District Court dated March 1, 2004 denying Defendant's Motion for Judgment NOV or in the alternative, for a new trial. (Appendix B).

STATEMENT OF JURISDICTION

The Court's Jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Third Circuit's opinion was rendered on August 12, 2005. (Appendix A). A Petition for Rehearing was denied by Order dated September 13, 2005. (Appendix H).

STATEMENT OF THE CASE

Petitioner Oz Optics, Ltd. ("Oz") is a Canadian corporation engaged in the manufacture of optical fiber communications equipment, with its principal place of business in Ontario, Canada. Respondent Dimensional Communications, Inc. ("DCI") is a New Jersey corporation that designs, manufactures and installs trade show booths.

The District Court exercised jurisdiction under 28 U.S.C. § 1332(a)(2).

DCI filed a Complaint for breach of contract, book account and quantum meruit in the United States District Court for the District of New Jersey on October 22, 2001. Oz filed an answer asserting the affirmative defense of set-off/recoupment. On November 12, 2002, the Magistrate Judge entered a Pretrial Scheduling Order that set December 31, 2002 as the deadline for filing motions to amend the pleadings. On May 16, 2003, Oz filed a motion to amend its answer to assert a counterclaim for conversion for the seizure of the trade show booth and other property. The Magistrate Judge denied Oz's motion, finding that Oz did not demonstrate good cause for failure to comply with the Pretrial Scheduling Order, and concluded that Oz's actions constituted undue delay and evidenced dilatory motive that did not meet the liberal amendment provisions of Fed. R. Civ. Proc. 15 (a). (Appendix G). On appeal of the denial of the Motion to Amend, the District Judge affirmed the denial. (Appendix E).

After a jury trial in December of 2003, the jury rendered a verdict in favor of DCI in the amount of $492, 766.01 and found that Oz was not entitled to any recoupment or setoff. The District court denied Oz's Motion for Judgment as a matter of law, or in the alternative, for a new trial. (Appendix B).

Oz and DCI entered into a contract for DCI to construct a trade show booth for Oz to use to market its optical fiber communications equipment. It was undisputed that Oz paid in full the cost of the construction of the trade show booth, $420,000, and that Oz paid in full for plasma screen

televisions that were part of the set up of its trade show exhibition. The dispute between the parties arose when Oz disputed DCI's billing for charges and costs that were beyond the scope of the contractual agreement, and which were never authorized by Oz. Indeed, some of the charges involved services allegedly rendered that not only were never authorized but were never even disclosed to Oz until the invoice was rendered by DCI. Other charges and expenses for which DCI sought payment were for services, the authorization for which were specifically rejected by OZ when authorization was sought by DCI. Despite explicit representations that there would be no mark up charged for certain expenses that were authorized, DCI's invoices included substantial mark up for expenses incurred to transport and set up the trade show booth to different trade show locations. Moreover, DCI affirmatively breached the parties contract by failing to provide services that it was agreed would be provided, without charge, as part of the initial $420,000 cost for the construction of the trade show booth.

Despite the fact that Oz paid in full for the construction of the trade show booth and for the plasma televisions that were part of its exhibition, when Oz rightfully objected to being billed for additional charges and expenses that were never authorized, and for substantial mark up for transportation, storage and the unauthorized services of a subcontractor retained by DCI, DCI resorted to self help and seized and retained control of the trade show booth, the plasma televisions, and computers and laptops that were indisputably owned by Oz. As a consequence of the wrongful holding of Oz's booth and equipment as "ransom" for the payment of the disputed invoices, Oz was forced to incur expenses of $160,000 to another vendor for the temporary

use of a trade show booth in order to continue marketing its product at trade shows.

At a preliminary conference in October of 2002, the court set a discovery deadline date of February 28, 2003. The discovery deadline was later extended to April 15, 2003 because the parties were actively engaged in settlement negotiations. Discovery actually continued however into May of 2003 due to ongoing settlement discussions. When it became evident that despite lengthy discussions, the case could not be settled, Oz filed a motion for leave to amend its answer to assert a counterclaim for conversion, based on the seizure and retention of Oz's property. The damages that flowed from the conversion included the cost of a temporary trade show booth to replace the one seized by DCI. lost profits due to Oz being forced to use a lesser quality booth that was not effective as the booth Oz contracted for and paid for DCI to construct, and the value of the plasma screen televisions converted by DCI. Although at the time the Motion to Amend was filed, a trial date had not been scheduled (and the case was not actually tried until seven months later), and the amendment would have required only minimal discovery to establish the affirmative claim for damages on the counterclaim, the court denied the Motion to Amend because it concluded that "good cause" for extension of the deadline to amend pleadings had not been established.

As a consequence of the denial of the motion for leave to assert the counterclaim, at trial, the jury heard testimony about the cost incurred by Oz for a replacement trade show booth, but the jury was instructed that it could not award damages or affirmative relief to Oz. Oz' defense\claim for setoff \recoupment was ignored by the jury, which was not instructed on the law as to the legality\illegality of DCI

seizing Oz's property as ransom for payment of invoices with extracontractual, unauthorized charges and expenses.

The jury awarded DCI $42,044.91 less than the full amount of the disputed invoices it sought payment for, and obviously engaged in mathematical calculations, as the verdict was not in a round figure, but was for $492,766.01. Thus, it is clear the jury discredited to some extent DCI's claimed entitlement to payment of the charges and expenses that were neither agreed to in the contract nor authorized post contract, and\or credited Oz's defense that the charges were not authorized. It is however impossible to know exactly what expenses the jury "deducted" from the invoices, because the verdict form allowed for a "lump sum" damages verdict, without any delineation of what charges and expenses the jury allowed and disallowed.

The verdict was tainted by the failure to instruct the jury on the law of self help so as to meaningfully analyze Oz's defense of set off\recoupment. Moreover, despite a wealth of evidence at trial that the disputed invoices consisted of unauthorized charges, substantial markup for services and expenses that were contrary to the promised "no markup" policy, billing after the fact for undisclosed, unauthorized services and expenses, billing for the unauthorized services of an independent contractor retained by DCI without Oz's knowledge or consent, and billing (at a markup) for services that the contract required to be provided free of charge as part of the initial purchase of the trade show booth, Oz was deprived of meaningful appellate scrutiny of the verdict as against the weight of the evidence, as it is unknown what evidence the jury credited and what evidence it did not credit in arriving at an unusually specific, not round figure, as its damages verdict.

REASONS FOR GRANTING THE PETITION

The resort to Rule 16(b)'s "good cause" standard for the extension of a deadline set by a Pretrial Scheduling Order for the amendment of pleadings eviscerates the mandate of Rule 15(a) that leave to amend the pleadings is to be freely given in the interests of justice, and on the facts of this case, Rule 13(f)'s authority for the lower courts to permit a counterclaim to be asserted where the failure to earlier plead the counterclaim was the result of inadvertence or excusable neglect and the interests of justice require allowing the counterclaim to be asserted, because it is a compulsory counterclaim which is precluded if not pled in the pending action. The consequence in this case of the District court and Third Circuit utilizing the good cause standard as a basis to override Rules 15(a) and 13(f) is that Oz is forever precluded from pursuing the compulsory counterclaim that arose from the same facts and transactions that were the basis of the Plaintiff's complaint. Oz attempted to pursue the counterclaim in a litigation in the Canadian courts, but it was determined that the counterclaim was barred, confirming that the proper forum to litigate the claim was aa a counterclaim to DCI's Complaint.

That Oz was precluded from a full presentation of evidence at trial as to the wrongful conduct of DCI in converting Oz's property, and the damages the conversion caused to Oz not only deprived Oz of the opportunity for an affirmative recovery that would have exceeded DCI's claim, but it also hampered substantially Oz's ability to defend against DCI's claim for invoices inflated with unauthorized markups, charges and expenses that were neither disclosed nor authorized, and billing for services the contract required to be covered by the payment for the initial construction of

the trade show booth. It allowed DCI to paint an inaccurate picture of having rendered services and incurred expenses that a customer refused to pay, without an appreciation that DCI's response to a legitimate objection to paying for a half a million dollars worth of unauthorized expenses and obscene mark up of expenses is to hold the customer's property in order to extort payment of illegitmate charges, crippling the customer's ability to market its product, after the customer paid $420,000 to have a trade show booth in order to market its product.

The hampering of Oz's ability to fully and fairly defend against DCI's claim by the presentation of Oz's counterclaim was exacerbated by the fact that the setoff\recoupment defense was presented to the jury with absolutely no law to guide the jury's consideration of that defense, due to the failure to charge the jury on the law of self help. Further, the detailed presentation of evidence to refute and rebut specifically each and every category of charges and expenses sought by DCI was effectively meaningless for Oz where the general verdict form allowed the jury to award a "number" without any basis for the District Court on post verdict motions, or the Court of Appeals, on appeal, to know what expenses the jury credited and determined DCI was entitled to recover and what expenses sought the jury disallowed. Without a basis to understand the jury's mathematics, Oz was deprived of the ability to demonstrate specifically that the jury's verdict was against the weight of the evidence.

In combination, the inability to present evidence on the counterclaim at trial, the failure to instruct the jury on the law to consider the setoff \recoupment defense, and the failure to require a specific verdict form that would delineate the jury's decision on each category of charges and expenses

sought by DCI deprived OZ of a fair trial, and a fair opportunity for post verdict review by the District Court, and appellate review by the Court of Appeals, in order to correct the errors of the jury.

Allowance of the writ in this case will provide an appropriate vehicle for the Court to provide instruction to the lower courts on the obligation to charge the law fairly raised by the trial evidence, and the desirability of specific verdict forms to facilitate meaningful post verdict and appellate review of jury verdicts.

I. Review Is Warranted To Correct The Error Of The Lower Courts In Erroneously Analyzing The Motion For Leave To Amend The Answer To Assert A Compulsory Counterclaim Under The Good Cause Standard Of Fed. R. Civ. Proc. 16(b), Thereby Eviscerating The Requirements Of Fed. R. Civ. Proc. 13(f) That A Counterclaim Be Allowed When The Interests Of Justice Require And The Identical Standard Of Fed. R. Civ. Proc. 15(a) That Leave To Amend The Pleadings Is To Be Freely Granted In The Interest Of Justice

Since in this case, leave to amend was sought to assert a compulsory counterclaim, both Fed. R. Civ. Proc. 15(a), governing the amendment of pleadings, and Fed. R. Civ. Proc. 13(f) governing the assertion of a counterclaim apply, and provide the standard the lower courts were required to apply in considering the application for leave to amend to assert a counterclaim, and the review of the Magistrate Judge's denial of leave to amend. Both Rules employ an interest of justice standard that unquestionably was met in this case; it was error to deny an amendment clearly dictated by the interests

of justice on the basis of the good cause standard of Fed. R. Civ. Proc. 16(b). Moreover, even if the good cause standard was properly part of the analysis, it was satisfied in this case, and the denial of the motion for leave to assert the counterclaim was error which not only deprived Petitioner of the right to an affirmative recovery that would have exceeded the Plaintiff's claim, but also tainted the verdict, in that it deprived Petitioner of a fair trial in defense of DCI's claims, thus warranting a new trial.

Fed. R. Civ. Proc. 15 (a) instructs that a motion for leave to amend the pleadings shall be freely given when justice so requires. This Court has instructed that in the exercise of their discretion to decide motions for leave to amend the pleadings, the District Courts are to heed the mandate of Rule 15(a) that amendments are to be freely granted in the interests of justice. *Forman v. Davis*, 371 U.S. 178, 182 (1962). A District court may deny leave to amend the pleadings if there is **undue** delay in seeking leave to amend, the seeking of leave to amend is motivated by bad faith, or the amendment would be prejudicial to the opposing party. *Id.* None of the factors that would warrant the exercise of discretion to deny the amendment were present in this case, and the context of seeking leave to amend satisfied the requirement that justice required granting leave to amend.

The slight delay in seeking the leave to assert the counterclaim was not undue. Oz sought leave to amend its Answer to assert the counterclaim only eight months after the answer was filed. The Motion for leave to amend was filed four and one half months after the deadline set to amend pleadings. No trial date had been set and indeed the trial was seven months later. That length of delay is not undue and would not justify denial of the leave to amend, where the

parties were engaged in settlement negotiations. The original discovery deadline was extended because it would not have been productive to expend efforts on discovery when the parties were attempting to amicably resolve the litigation, and indeed discovery actually continued past the extended discovery deadline date, into May of 2003 because of ongoing settlement discussions.

It would have been even more counterproductive to engaging in fruitful settlement discussions to simultaneously file a Motion seeking leave to assert a counterclaim that would exceed the affirmative relief sought by DCI. In the same manner that settlement discussions warranted an extension of the original discovery deadline, it explained a good faith reason for the slight delay in seeking leave to amend. Nor was there any basis to find that the amendment was motivated by bad faith. Only when good faith efforts to resolve the case failed did Oz seek leave to amend to assert the counterclaim. The counterclaim was well grounded in fact and law and asserted in good faith. It was never disputed that DCI seized and maintained the trade show booth that had been fully paid for as well as other equipment that was owned by Oz. It was never in dispute that the reason DCI held and refused to return to Oz the booth and other property it owned was because there was a legitimate objection to a half a million dollar invoice that was inflated and padded with a host of unauthorized charges and markups that were directly contrary to the no markup policy. It was consistently DCI's position that the booth and equipment would be returned to Oz if he capitulated and paid the invoice, notwithstanding legitimate objection to unauthorized charges and being billed for services that were supposed to be provided inclusive with the payment for the construction of the booth. The undisputed facts were more than sufficient to

assert a cause of action for conversion, a cause of action that requires demonstrating that one has exercised unauthorized dominion and control over the property of another inconsistent with or to the exclusion of others. *Chemical Bank v. Miller Yacht Sales*, 173 N.J. Super. 90, 99-100 (App. Div. 1980). That there was a reasonable basis in fact and law for a counterclaim for conversion dispelled any basis to deny the motion for leave to amend as motivated by bad faith.

The amendment would not have resulted in any prejudice to DCI that would justify denial of leave to amend. Since it was undisputed that DCI retained the booth and equipment in order to extract payment of its bill, the facts that bore on the conversion cause of action would not have required additional discovery. On the liability issue of the conversion cause of action, it was solely a question of law whether the unauthorized retention of the booth and equipment constituted conversion. Only minimal and finite discovery would have been required to establish the damages for conversion. Even without the counterclaim, the evidence at trial included the $160,000 expense Oz incurred for a temporary replacement booth. Limited discovery consisting of an expert to quantify Oz's lost profits flowing from the conversion, and the fair market value of the plasma television screens is the only additional discovery that would have been necessitated by the amendment; any prejudice to DCI would have been eliminated by a short extension of discovery to allow DCI discovery to meet the damages claim on the conversion counterclaim. Rigid adherence to the deadline of the Pretrial Scheduling Order was erroneous, where discovery was extended because the parties did not pursue discovery while engaged in settlement discussions. Since the settlement discussions were also what caused the short delay in asserting the counterclaim, it would have been equally appropriate to

extend discovery to allow DCI to conduct discovery on the damages that flowed from the conversion counterclaim.

In sum, under Fed. R. Civ. Proc. 15(a) , the interests of justice dictated that leave to amend should have been granted, and there were no countervailing considerations of undue delay, bad faith or prejudice that justified denial of leave to amend. Further, that the appropriate exercise of discretion required allowing leave to amend the answer to assert the counterclaim is buttressed by consideration under Fed. R. Civ. Proc. 13(f). The record below included the fact that there was a breakdown in communication between Petitioner and its counsel that contributed to the delay in seeking leave to file a counterclaim. Indeed, the record below also included that Petitioner discharged its counsel and retained new counsel one day after the Magistrate Judge denied the motion for leave to amend. A breakdown in communication between Petitioner and its counsel resulting in a short delay in seeking leave to assert the counterclaim is sufficient to meet the inadvertence and\or excusable neglect standard of Fed. R. Civ. Proc. 13(f). *Eastern Minerals & Chemicals Co. v. Mahan*, 225 F.3d 330 (3d Cir. 2000). That fact, coupled with all of the other relevant factors as addressed above, dictated granting the motion for leave to amend as required by the interests of justice. The equities that weighed in favor of permitting Oz to assert the counterclaim were particularly compelling where it was a compulsory counterclaim, precluded when Oz was not permitted leave to assert it in the action by DCI. *Budd Co. v. Travelers' Indemnity Co.*, 820 F.2d 787 (6th Cir. 1987); *Xerox Corporation v. SCM Corporation*, 576 F.2d 1057, 1059 (3d Cir. 1978).

Alternatively, assuming for analysis that it was appropriate for the lower courts to consider the good cause standard of Fed. R. Civ. Proc. 16(b) as part of the analysis, the same factors established that there was good cause to extend the deadline to amend pleadings. That there was a delay while settlement negotiations were ongoing, the breakdown in communication with counsel, the merits of the counterclaim, and the fact that discovery was extended independent of the counterclaim all established good cause to extend the deadline, and the rigid adherence to schedule, at the cost of Oz losing altogether the right to assert the counterclaim, was erroneous. Because the denial of the amendment also infected the trial and verdict, as set forth above, the error in denying the amendment required reversing the judgment entered on the jury verdict, and remanding for a new trial to include trial on the counterclaim.

II. Review Is Warranted Because The Lack Of Jury Instruction On Self Help Rendered The Defense Of Self Help\Recoupment Meaningless And Deprived Petitioner Of A Fair Trial; The Use Of A General Verdict Form On A Multi Faceted Damages Claim Deprived Petitioner Of Effective Post Verdict And Appellate Review Designed To Correct Jury Error

Despite uncontradicted evidence that DCI made a unilateral decision that its "remedy" for a customer voicing legitimate objection to being billed for unauthorized charges and expenses was to seize property the customer paid for and rightfully owned, together with unrebutted testimony that the seizure of the booth and equipment caused Oz to incur $160,000 in expenses for a replacement booth, the jury completely disregarded the setoff\recoupment defense. That result is not surprising, however when it is considered

that although armed with uncontested facts, the jury was not provided with **any** law to guide its analysis of those facts. The jury was not provided with the relevant law on self help to guide it in determining what the legal consequence of DCI's use of self help was. Without a charge to decide whether the resort to self help was or was not appropriate, and what consequence would flow if the jury determined the self help was wrongful, the jury could not have reached any result other than to disregard the setoff\recoupment claim. Without being instructed on law and how that law applied to the facts, the jury could only conclude that the facts surrounding the resort to self help, although undisputed, were irrelevant to the deliberation process and rendering of a verdict. Where the jury disregarded a defense for which the facts were undisputed, the only conclusion can be that the failure to charge the relevant law was of sufficient magnitude as to constitute a miscarriage of justice and warrant a new trial.

The evidence presented at trial established that there were a myriad of categories of expenses and charges included on the disputed bills, and that the justification proffered by the Plaintiff varied greatly for the different categories. Further, Oz presented quite specific evidence to rebut that the different categories were never authorized, were outside of or in contradiction to the contract terms, or in some cases, were explicitly rejected by Oz when approval was sought. This was not an "all or nothing" case where the jury would either believe or disbelieve that DCI was entitled to recover the charges and expenses it sought as a whole. Rather, the evidence as presented at trial required the jury to consider the evidence presented at trial as to each category of expenses\charges claimed. The evidence at trial, and the issues as framed by the trial evidence, required a verdict form

that would have the jury delineate specifically what charges and expenses it was awarding to DCI.

The materiality of the error in using a general verdict form became evident when the jury returned a verdict that was more than $42,000 less than what DCI sought. While it is obvious the jury discredited some portion of the charges sought, the lump sum damages verdict makes it impossible to discern what the jury deducted in arriving at its verdict. The inability to discern what the jury deducted from the total recovery sought substantially prejudiced Oz in its post verdict motion for judgment notwithstanding the verdict. Oz's motion for judgment and\or for a new trial was premised in part on demonstrating that the conclusion that DCI was entitled to recover for the disputed charges was against the weight of the evidence. Yet the post verdict review and appellate review of the demonstration that the verdict was against the weight of the evidence was severely hampered by the inability to know what the jury did and did not include in its damages verdict.

The severe limitation on post verdict and appellate review of the damages verdict was material in light of the very substantial evidence at trial that rebutted DCI's entitlement to recovery for each category of charges sought.

Oz was induced to contract for the construction of the trade show booth by DCI, notwithstanding that the price was more than double what Oz originally budgeted for a trade show booth, by DCI's agreement to provide, free of charge, "white collar" supervision for the trade shows for a period of one year. The evidence at trial could only rationally support a conclusion that DCI breached the contract by failing to provide free white collar supervision, in one of two ways.

Either DCI breached the contract by failing to provide the promised white collar supervision without charge, or that DCI provided white collar supervision by an independent contractor it retained without Oz's authorization, a Mr. Trybulec. Not only was Oz billed for the services of Mr. Trybulec despite never authorizing DCI to retain him, but DCI added a substantial markup to its actual cost to have Trybulec render services. If the jury deemed that DCI was not in breach of the agreement to provide white collar supervision, because it was provided by Trybulec, then DCI breached the contract by failing to provide white collar supervision free of charge. Oz was not only billed for Trybulec's white collar supervision, it was billed for Trybulec's services at a markup, despite the agreement that there would be no markup. Moreover, despite the fact that Oz explicitly rejected DCI's proposal for multi media and software design work, and retained a different contractor to perform that work, at least part of the unauthorized services for which DCI retained Trybulec, and billed Oz for, were multi media and software design services.

Trybulec's services were not the only charges that were marked up contrary to the no mark up policy contracted for. Equipment purchased for the trade show booth was not billed at cost but was also marked up, as were expenses for freight to transport the booth to trade shows and travel expenses for the personnel that attended the trade show to oversee the set up of the booth and the running of the exhibit at the trade show. Oz was billed for "refurbishing" the booth after a trade show, although this expense was neither provided for in the contract nor ever authorized by Oz. The contract price was to be inclusive of storage charges for the booth, yet Oz was billed for storage. Without authority in the contract or post contract from Oz, DCI billed for "handling" charges and internal labor costs as well.

The above is only a short synopsis of the substantial trial evidence that countered, point by point, charge by charge, dollar by dollar, DCI's entitlement to recover for inflated, unauthorized expenses, despite its uncontradicted breach of the contract in failing to provide for free white collar supervision. The synopsis is sufficient to demonstrate that a lump sum verdict that rendered impossible post verdict scrutiny of the judgment as against the weight of the evidence and appellate review impossible deprived Oz of a fair trial and meaningful post verdict review to correct the jury's errors.

In combination, the prejudicial denial of the right to litigate the counterclaim, the failure to provide the jury with law to guide the consideration of the setoff\recoupment defense, and the failure to use a specific jury verdict form to delineate what damages were awarded and which claims were discredited completely deprived Oz of the right to a fair trial and so infects the verdict as to require reversal and remand for a new trial, to include the counterclaim.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

PETER A. OUDA
PETER A. OUDA, LLC
19 North Bridge Street
Somerville, NJ 08876
(908) 953-9300

Attorneys for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DECIDED AUGUST 12, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-1817

DIMENSIONAL COMMUNICATIONS, INC.

v.

OZ OPTICS, LTD.,

Appellant.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 01-cv-4893)
District Judge: Honorable William G. Bassler

Submitted Under Third Circuit LAR 34.1(a)
May 10, 2005

Before SLOVITER and FISHER, *Circuit Judges*.
and POLLAK,* *District Judge*.

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* Honorable Louis H. Pollak, Senior District Judge for the United States District Court of the Eastern District of Pennsylvania, sitting by designation.

Appendix A

OPINION OF THE COURT

POLLAK, District Judge.

This diversity case arises out of a contract dispute between Dimensional Communications, Inc., ("DCI"), and Oz Optics, Ltd. ("Oz").[1] Oz, a manufacturer of optical fiber communications equipment, had a jury verdict entered against it on a breach of contract claim brought by DCI, a corporation that designs, manufactures, and installs trade-show booths. Oz appeals from the District Court's orders (1) denying Oz's motion for leave to file a counterclaim, and (2) denying Oz's post-trial motion for judgment as a matter of law or, in the alternative, for a new trial. The District Court exercised jurisdiction over this suit under 28 U.S.C. § 1332(a)(2),[2] and this court has appellate jurisdiction under 28 U.S.C. § 1291. For the reasons which follow, we will affirm.

I.

Inasmuch as we write chiefly for the parties it is not necessary to recite the facts of this case in detail. Oz and DCI had entered into a contract according to which DCI was to design and construct a trade-show booth for Oz. After the

1. Oz has been alternately referred to as "Oz" or "OZ" in the parties' submissions and in the District Court docket. For the sake of uniformity, we will use only "Oz" here.

2. Oz is a Canadian corporation with its principal place of business in Ontario; DCI is a New Jersey corporation with its principal place of business in Northvale, New Jersey.

booth was completed, DCI coordinated the transportation of the booth to four trade-shows, and performed maintenance and set-up activities at each show. DCI billed Oz separately for the maintenance and set-up costs, and Oz refused to pay for any of these ancillary charges on the ground that it had not authorized them. While Oz had most of the electronic equipment used in its booth shipped back to its New Jersey facility, DCI retained the booth itself and some of the electronic equipment pending Oz's payment of the outstanding invoices. On October 22, 2001, DCI filed its complaint in the United States District Court for the District of New Jersey, asserting claims for breach of contract, book account, and quantum meruit. Oz's answer asserted the affirmative defense of set-off/recoupment, but it contained no counterclaims.

On November 12, 2002, Magistrate Judge Madeline Cox Arleo entered a Pretrial Scheduling Order that, *inter alia,* set December 31, 2002, as the deadline for filing motions to amend the pleadings. On May 16, 2003, Oz filed a motion to amend its answer to assert a counterclaim for conversion for the seizure of the trade-show booth and other property. After briefing and argument, Magistrate Judge Arleo denied Oz's motion, finding, pursuant to Fed. R. Civ. Proc. 16(b), that Oz had not shown good cause for its failure to comply with the Pretrial Scheduling Order. Magistrate Judge Arleo further found that Oz's actions constituted undue delay and evidenced dilatory motive, such that Oz could not meet the liberal amendment provisions of Fed. R. Civ. Proc. 15(a). Oz appealed Magistrate Judge Arleo's denial of its motion to amend, and the District Court affirmed the denial. This affirmance is the first subject of this appeal.

Appendix A

The case was tried before a jury in December, 2003. The jury rendered a verdict in favor of DCI in the amount of $492,766.01. The jury also found that Oz was not entitled to any recoupment or setoff. On January 13, 2004, Oz filed a motion for judgment as a matter of law or, in the alternative, a new trial. The District Court denied that motion, finding that Oz was entitled neither to judgment as a matter of law nor to a new trial. The District Court's denial of this post-trial motion gives rise to Oz's second and third grounds of appeal.

II.

We review a district court's denial of leave to amend a pleading for abuse of discretion. *See Arab African Int'l Bank v. Epstein,* 10 F.3d 168, 174 (3d Cir.1993). "An abuse of discretion occurs when the District Court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Montgomery County v. Microvote Corp.,* 320 F.3d 440, 445 (3d Cir.2003) (citation and quotation marks omitted).

We exercise plenary review over a district court's denial of a Rule 50(b) motion for judgment as a matter of law. *See, e.g., Delli Santi v. CNA Ins. Cos.,* 88 F.3d 192, 200 (3d Cir.1996).

We review a district court's denial of a new trial motion for abuse of discretion. *Honeywell, Inc. v. American Standards Testing Bureau, Inc.,* 851 F.2d 652, 655 (3d Cir.1988).

Appendix A

III.

A. Motion to Amend

Where, as here, a party seeks to amend a pleading after a responsive pleading has been served, it may do so "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. Proc. 15(a). "Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir.1997). In addition, a court's "schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge." Fed. R. Civ. Proc. 16(b).

Magistrate Judge Arleo found that Oz could not satisfy Rule 16(b)'s good cause requirement because Oz was in possession of the facts underlying its proposed counterclaim well before the amendment deadline. The Magistrate Judge found further that Rule 15(a)'s liberal amendment provision did not extend to Oz because Oz's delay was undue and prejudicial, and because it evidenced a dilatory motive. The District Court agreed with the Magistrate Judge's findings, and concluded that the Magistrate Judge's denial of Oz's motion to amend did not constitute clear error.

Oz now argues that the Third Circuit has not adopted a "good cause" requirement in determining the propriety of a motion to amend a pleading after the deadline has elapsed, and that the District Court thus abused its discretion in

denying the motion to amend. We disagree. In *Eastern Minerals & Chems. Co. v. Mahan,* 225 F.3d 330, 340 (3d Cir.2000)—a case with a similar procedural history—this court approved the district court's determination that a failure to satisfy Rule 16(b)'s "good cause" requirement was sufficient to deny a motion to amend filed six months after the deadline for amendments to pleadings. Further, we find no error in the Magistrate Judge's finding, which the District Court approved, that Oz could not satisfy even the liberal amendment provisions of Rule 15(a) because Oz's delay was undue and its requested amendment would be prejudicial to DCI. In short, there is no ground for disturbing the District Court's order.

B. Motion for Judgment As a Matter of Law

A denial of a post-trial motion for judgment as a matter of law shall be affirmed where "there is sufficient evidence to support the verdict, drawing all reasonable inferences in favor of the verdict winner." *Blum v. Witco Chemical Corp.,* 829 F.2d 367, 372 (3d Cir.1987).

Oz contests two elements of the verdict on the ground that there was, Oz contends, no rational basis for them. First, Oz asserts that the jury erred in finding that Oz had authorized ancillary charges, which included markups for subcontractor work, and freight, handling, refurbishing and storage charges.[3] Yet the jury could reasonably have inferred that Oz

3. As a subsidiary element of its claim that the jury erred in finding that Oz had approved the ancillary charges, Oz argues that the jury erred further in adopting DCI's calculation of the handling (Cont'd)

had authorized the ancillary charges. For example, the jury heard testimony that a sub-contractor of DCI had overheard Oz's president approve the markups; that a DCI employee had explained to Oz's president that there would be handling charges; and that Oz's president had been quoted a per-show estimate of refurbishment costs. Further, as the District Court found, there was evidence of an oral agreement for storage charges. This testimony formed a legitimate basis for the jury's finding that Oz had authorized the charges. Thus, Oz's first claim of error is baseless.

Second, Oz contends that the jury erred in failing to reduce its verdict by the monies that Oz lost as a result of DCI's seizure of Oz's booth and some of the electronic equipment used in that booth. Yet having found that Oz had authorized the ancillary charges and hence was unjustified in refusing to pay for them, and having heard testimony from DCI stating that it would have returned the retained property upon receipt of payment from Oz, the jury could have reasonably concluded that Oz was not entitled to a set-off. Accordingly, Oz's claim that the jury erred in rejecting its recoupment/set-off defense is also baseless.

(Cont'd)
charges inasmuch as DCI, so Oz contends, relied upon a "myster[ious]," "undisclosed mathematical equation" to arrive at this calculation. As the District Court found, however, DCI presented testimony describing how it arrived at the handling charges. The jury thus had a reasonable basis upon which to conclude that Oz did in fact owe DCI money in the asserted amount.

In sum, because sufficient evidence supported the jury's verdict, the District Court did not err in denying Oz's motion for judgment as a matter of law.

C. Motion for a New Trial

Oz argues that three grounds supported its motion for a new trial. First, Oz contends that, even though neither party requested a jury instruction on whether DCI was entitled to use self-help, the District Court should have issued *sua sponte* an instruction disapproving the use of self-help. Second, the District Court should have provided a jury verdict sheet that itemized the charges Oz would be found to have owed DCI since, without such itemization and in light of the jury's verdict that Oz owed less than DCI claimed it did, the parties cannot determine which charges the jury in fact found that Oz was obligated to pay. Finally, Oz charges that the District Court should have found, as a matter of law, that DCI breached the contract with Oz, and instructed the jury accordingly.

Oz's charge that the District Court erred in failing to instruct on the permissibility of the use of self-help is unavailing. "[A]n appellate court will not consider trial errors [involving alleged deficiencies in jury instructions] to which no objection was made." *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132, 138 (3d Cir.1973). Before the District Court, Oz neither requested a jury instruction on the permissibility of self-help nor objected to the omission of such an instruction. We will not entertain Oz's objection to the jury instructions now.

Oz's claim that the judge ought to have furnished the jury with an itemized jury verdict form is no more meritorious. "It is well established that the trial court may exercise broad discretion in determining whether to use a general verdict or the procedures described in Rule 49 of the Federal Rules of Civil Procedure." *Kazan v. Wolinski,* 721 F.2d 911, 915 (3d Cir.1983). Further, there is no evidence in the record that Oz objected below to the jury verdict form, and its failure to do so before the District Court bars it from raising that objection before this court. Accordingly, we decline to find that the District Court erred in constructing the jury verdict form as it did.

For similar reasons, we find no merit in Oz's claim that the District Court should have found, as a matter of law, that DCI breached the contract with Oz, and instructed the jury accordingly. The District Court judge properly determined that the parties had adduced evidence sufficient to create an issue of fact on this matter. Further, Oz did not at trial raise any objections to the judge's asserted failure to instruct the jury on the alleged breach of contract, and so we will not consider these objections now.

In sum, we find that the District Court did not abuse its discretion in denying Oz's motion for a new trial.

IV.

For the foregoing reasons, we do not find merit in any of Oz's claims of error. Accordingly, the challenged orders of the District Court will be affirmed.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DENYING J.N.O.V. AND NEW TRIAL DATED MARCH 1, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. 01-4893 (WGB)

DIMENSIONAL COMMUNICATIONS, INC.,

Plaintiff,

vs.

OZ OPTICS, LTD.,

Defendants.

BASSLER, DISTRICT JUDGE:

Defendant Oz Optics, Limited ("Defendant"), moves for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), or in the alternative, a new trial pursuant to Fed. R. Civ. P. 59. For the reasons set forth below, the Court **denies** Defendant's motion.

I. BACKGROUND

Plaintiff Dimensional Communications, Inc. ("Plaintiff") filed this action on October 22, 2001, alleging that certain monies were due and owing based on a contractual agreement between the parties involving the construction of a trade show

exhibit booth. After a dispute arose between the parties regarding the scope of the agreement and the basis for certain costs, Defendant refused to tender payment for services that it deemed excessive and outside the scope of the parties' agreement. In turn, Plaintiff seized the trade show booth and several plasma televisions pending full payment of the disputed sums. (Mark Brandecker December 9, 2003 Testimony ("Brandecker I"). 134:18-28; 135:1-24; Omur Sezerman 83:3-17.)

At the conclusion of trial, although Plaintiff had sought $534,810.92 in damages, the jury returned a verdict on December 17, 2003 awarding Plaintiff $492,766.01 in damages.

II. DISCUSSION

A. *Motion for Judgment as a Matter or Law*

Federal Rule of Civil Procedure 50(b) provides:

> If, for any reasons, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew[1] its request for judgment as a matter of law

1. The post-verdict motion is a renewal of an earlier motion made at the close of the evidence. Thus, a motion for judgment as a matter of law, filed at the close of all evidence is a prerequisite for a (Cont'd)

> by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
>
> (1) if a verdict was returned;
>
> (A) allow the judgment to stand;
>
> (B) order a new trial, or
>
> (C) direct entry of judgment as a matter of law[.]

(footnote added).

"Whether the evidence presented at trial is sufficient to create an issue of fact for the jury or will permit the court to enter judgment as a matter of law is solely a question of law to be determined by the trial court." Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 2524, at 250-51 (1995 ed.). As explained by the Third Circuit in *Lighting Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (1993):

(Cont'd)

motion under Rule 50(b). *Fineman v. Armstrong World Indus., Inc.*, 774 F. Supp. 225, 230 (D.N.J. 1991), *rev'd on other grounds*, 980 F.2d 171 (3d Cir. 1992) (quoting *Associated Bus. Tel. Sys. Corp. v. Greater Capital.*, 729 F. Supp. 1488, 1502 (D.N.J.), *aff'd*, 919 F.2d 133 (3d Cir. 1990)).

> Such a motion should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability. [*Wittekamp v. Gulf & Western Co., Inc.*, 991 F.2d 1137, 1141 (3d Cir. 1993).] In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version. Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 190 (3d Cir.1992), cert. denied, 507 U.S. 921, 113 S.Ct. 1285, 122 L.Ed.2d 677 (1993). Although judgment as a matter of law should be granted sparingly, a scintilla of evidence is not enough to sustain a verdict of liability. Walter v. Holiday Inns, Inc., 985 F.2d 1232, 1238 (3d Cir.1993). "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but *whether there is* evidence upon which the jury could properly find a verdict for that party." Patzig v. O'Neil, 577 F.2d 841, 846 (3d Cir.1978) (citation omitted) (quotation omitted).

Id. at 1166.

1. *Defendant's Recoupment Claim*

Defendant argues that the jury erred in failing to reduce its verdict by monies that Defendant lost when Plaintiff took

possession of Defendant's trade show booth and several plasma televisions as security for the monies Defendant owed. Defendant contends that Plaintiff had no legal right to engage in this self-help,[2] that that was a conclusion Plaintiff did not challenge, and that as a result of Plaintiff's actions, Defendant was deprived of the use and enjoyment of the exhibit booth and was forced to sign a contract with another exhibit house for a replacement trade show booth at an additional cost of approximately $160,000. Sezerman 81:11-82:22. Defendant points out that during trial, Plaintiff raised no challenge to the costs incurred, or question the causal connection between its actions and Defendant's costs for a new booth, Therefore, Defendant argues that there was no rational basis for the jury to conclude that it was not entitled to an offset.

In response, Plaintiff maintains that Defendant's entire argument is predicated on the claim that Plaintiff's possession of Defendant's trade show exhibit was improper or unauthorized and that Defendant's nonpayment was justified. As indicated by Plaintiff, the jury clearly rejected this premise, finding that nearly all of Plaintiff's charges were proper and that Defendant's refusal to pay Plaintiff was unjustified. Moreover, the jury evidently chose to believe testimony indicating that as soon as Plaintiff received payment from Defendant for the amounts due, it would return the exhibit to Defendant. Brandecker I 135:21-24; Sezerman 83:9-17. Further, simply because Sezerman's testimony regarding the cost of the replacement trade show booth was

2. Although Defendant faults Plaintiff for not including a jury instruction regarding self help, Defendant also did not propose an instruction on that issue.

uncontested does not obligate the jury to find such testimony credible. As pointed out by Plaintiff, the Court cannot substitute its assessment of the facts for that of the jury.

In any event, even if the jury had decided that Plaintiff's conduct was improper, it would have been impossible for the jury to determine how much recoupment would have been warranted for the plasma televisions because Defendant did not establish that amount at trial. As admitted by Defendant, the fair market value of the plasma screens still needs to be established. Def.'s Br. In Support of Motion, at 4.

2. *Authorization of Plaintiff's Charges*

Next, Defendant claims that the jury concluded mistakenly that it had authorized certain charges sought by Plaintiff. Specifically, Defendant maintains that there was absolutely no evidence that it authorized markups for: (1) the services of Messrs. Zbigneieu Trybulec and Roger Hummel prior to March 2001; (2) equipment purchases; (3) freight shipments; (4) a handling charge for loose materials; (5) or the assessment of storage fees. Each will be addressed in turn.

a. *Trybulec and Hummel*

As an initial matter, Defendant contends that Plaintiff argued that all authorizations were traceable back to Richard Sanftenberg and that Sanftenberg's authority was limited to equipment purchases. In so arguing, Defendant tries to paint the trial testimony in the way that it believes the jury should have regarded it. For instance, Defendant states that "[i]n

OZ's view, [Sanftenberg] is a disgruntled former employee whose testimony was full of inconsistencies the jury should have acknowledged." Def.'s Br. In Support of Motion, at 5; *see also id.* at 13 ("the conduct and testimony of Messrs. Brandecker and Sneed should have negated the jury from accepting their perceptions of Sanftenberg's authority as true and correct"). Defendant also attempts to dictate "[t]he point the jury *should have* taken away from" Sanftenberg's testimony, and what testimony "*needs* to be read in conjunction" with what other evidence in order to reach the same conclusion as Defendant — that it did not authorize Plaintiff to charge for certain markups. *Id.* at 7 (emphasis added).

Even if certain testimony or the absence of written documents supports Defendant's position, as provided in the jury instructions, however, it is within the province of the jury to believe or disbelieve a part or all of a witness' testimony and determine the credibility of any witness.[3] Thus, the jury is not bound to adopt Defendant's view of Sanftenberg as a disgruntled former employee. Moreover, the jury need not agree with Defendant's perceptions or conclusions regarding the trial testimony; rather, there need only be sufficient evidence upon which the jury could properly have found a verdict for Plaintiff.

As identified by Plaintiff, there was sufficient testimony showing that many of the authorizations traced back to Omur

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3. Because a witness's credibility is determined by the jury and cannot be overturned or ignored by the Court on a motion for judgment as a matter of law, Defendant's argument to the Court that Brandecker should be disbelieved due to "important lapses" in recollection, *see* Def.'s Br. In Support of Motion, at 14, is similarly not compelling.

Sezerman, Defendant's President, or to Gillian Darby, Defendant's former trade show coordinator. For example, Sanftenberg testified that at the end of February or early March 2001, he accidentally stumbled onto a piece of paper setting forth billing information for subcontractor Zbigneieu Trybulec; as a result, Sanftenberg learned that Plaintiff was marking up the services of Trybulec and subsequently told Sezerman about the markup. Sanftenberg 17:3-18:9. Although Sanftenberg expressed his concerns to Sezerman about Trybulec's high cost, Sezerman responded that Defendant needed Trybulec at the first show "in case something goes wrong" because it was Defendant's "coming out party." Sanftenberg 17:3-20:10.

In response, Defendant asserts that this testimony only served to show that Plaintiff did not voluntarily reveal its markups to Defendant and that if Trybulec's services were authorized by Defendant, the starting point for Defendant's obligation to pay for Trybulec should be the end of February/ beginning of March when Sanftenberg testified he stumbled upon the billing information.

While Sanftenberg may not nave stumbled upon the billing information until at the end of February/beginning of March of 2001, Sezerman's response to the markup information was such that the jury had a basis to believe that Sezerman knew about and regardless of the markup, had authorized Trybulec's services from the outset and not just from that moment forward.

Another example of testimony supporting the jury's decision that the charges were authorized is when Trybulec

testified that he overheard conversations between Sanftenberg and Sezerman during which Sanftenberg obtained Sezerman's approvals for certain items. Trybulec 8:18-10:10. Sanftenberg and Darby also testified that they could not think of anything that Plaintiff had done with respect to the exhibit that was not authorized by "someone at OZ." Sanftenberg 59:5-7; *see also* Darby 37:20-25.

Thus, the Court concludes that there was sufficient evidence to support a determination by the jury that Defendant authorized the services of Messrs. Trybulec and Hummel prior to March 2001.

b. *Markups on Equipment Purchases, Federal Express Charges, Plaintiff's Internal Labor Costs, and Freight Charges*

According to Defendant, the jury had no legal basis to award Plaintiff the markups on equipment purchases, Federal Express charges, Plaintiff's internal labor costs, or freight charges. In so arguing, Defendant points out that Plaintiff represented to Defendant that there would be no markups, that the October 2000 contract ("Contract") had no provision allowing for markups, and that by letter dated August 23, 2000, Brandecker told Defendant that Plaintiff "did not have any markups." Def.'s Ex. 2 attached as Ex. N to Cert. Of William D. Wallach in Support of Mot. For Judgment as a Matter of Law ("Wallach Cert.").

However, Brandecker testified that, as stated in the Contract, Plaintiff's statement that it would not add markups dealt only with field services. Brandecker December 16, 2003 Testimony ("Brandecker II") 79:17-21.

Brandecker also testified that Sezeran requested that the freight charges be billed through Plaintiff to Defendant rather than being placed on Defendant's credit card and that he (Brandecker) explained to Sezerman prior to the first trade show in Anaheim and "numerous times" that there would be a markup on the freight because Plaintiff had "outlaid the cash." Brandecker I 80:15-81:14; 125:8-126:14; Brandecker II 74:8-75:14. According to Brandecker's testimony, instances such as this where Plaintiff "outlaid" cash were exceptions to the statement in the August 23, 2000 letter concerning markups. Brandecker II 79:25-80:10.

Lastly, Defendant suggests that Brandecker's testimony regarding Sezerman's request to not place the freight charges on Defendant's credit card should not be believed because his testimony regarding the timing of the alleged conversation is "hazy". However, as noted earlier, on a motion for judgment as a matter of law, the Court cannot weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version. *See Lightning Lube*, 4 F.3d at 1166.

Therefore, judgment as a matter of law is not warranted on this issue.

c. *Handling Charges*

Next, Defendant contends that Plaintiff's claim for handling charges was fatally flawed in two respects: (1) there was no contract between the parties setting forth this charge or its amount, and while Plaintiff's promotional materials refer to handling charges, they were not made part of the

Contract; (2) the mathematical equation Plaintiff used to calculate handling charges for certain of the materials remains a "mystery".

Contrary to Defendant's allegations, Brandecker did in fact explain how the charges were established. He testified that there was a flat per case charge for handling as well as additional charges for handling the loose material based on the materials and the time involved in removing the steel off the flat beds. Brandecker I 91:15-24; Brandecker II 57:1-23. Indeed, notwithstanding the absence of a contract, Brandecker testified that he explained to Sezerman that there would be a charge for the loose materials. *Id.* Steven Wietzke, another Plaintiff employee, confirmed through his testimony that there was "quite a bit" of handling on this job due to items such as steel, I-beams, and girders. Wietzke December 11, 2003 Testimony ("Weitzke I") 100:16-101:4.

This testimony was sufficient evidence for the jury to award Plaintiff the handling charges.

d. *Storage Charges*

Defendant contends that the jury's verdict should be vacated because there was never a meeting of the minds between the parties with respect to storage, and that the written contract was never signed by Defendant.[4] However,

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4. Defendant also claims that Plaintiff continued to charge storage for fifty-seven cases even when there were only forty-two cases. Similarly, Defendant maintains that Plaintiff never explained how it charged Defendant the freight costs that it did after the fourth

(Cont'd)

notwithstanding any evidence to the contrary, there was also testimony by Brandecker suggesting that there had been an oral agreement — Brandecker testified that he told Sezerman what the storage charges were, and denied that he ever agreed to store the exhibit for free. Brandecker I 109:22-110:16; 119:3-6. Moreover, the promotional materials provided to Defendant indicated that there would be a per case charge for storage. *See* Ex. H attached to Wallach Cert.

e. *Refurbishment and Miscellaneous Charges*

Contrary to Defendant's contention that Plaintiff failed to establish its entitlement to $140,000 in refurbishment charges, there was sufficient evidence for the jury to have awarded such charges to Plaintiff. Brandecker testified that he told Sezerman about the "check-out" or "refurbishing" charges at the show in Anaheim and that he gave Sezerman a budget range of "$30,000 to $45,000 per show." Brandecker I 78:5-19:3. Sanftenberg also stated that during a trade show he overrheard Brandecker explaining the "check-out" process to Sezerman. Sanftenberg 42:12-43:25. Further, Weitzke provided detailed testimony concerning the labor-intensive nature of this process and explained that it takes up Plaintiff's "whole shop" and lasts for about "two weeks." Weitzke II 11:6-12:6.

(Cont'd)
show given the fact that there was less being shipped both to and from the show. The Court notes, however, that although it is impossible to discern what the break down was of the total jury verdict, the jury did not award the full amount of damages sought by Plaintiff.

Additionally, Darby testified that: (1) she heard Brandecker discussing the check out process with Sezerman; (2) she understood what would be done during this process and that it was to be done after each show; and (3) she understood that such a process is typical in her experience with trade shows. Darby 33:19-34:16. Finally, Sanftenberg confirmed that he knew Plaintiff was performing the check out process. Sanftenberg 40:6-24; 41:4-13; 53:9-55:10; 55:24-56:5; 56:24-57:3.

In addition to the refurbishment charges, there was a sufficient basis for the jury to conclude that the miscellaneous charges were also properly assessed by Plaintiff. Although Defendant complains that Wietzke could not itemize where the $11,000 in "miscellaneous" charges came from, Wietzke did in fact explain that the "miscellaneous" purchases were "all the in-house stock material that we have on hand that's taken out of stock and put on the job . . . the lumber, and 2 x 4s, the plywood and so on." Weitzke II 35:6-17. Weitzke further explained that the details of these charges consisted of the specific materials identified by the foreman at the end of each job. *Id.* 36:1-5.

Thus, there was sufficient evidence from which a jury reasonably could find that these charges were properly assessed by Plaintiff.

B. *Motion for New Trial*

Federal Rule of Civil Procedure 59(a) provides:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an

> action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . .

A new trial is warranted only where the verdict is grossly excessive and bears no rational connection to the evidence. *Gumbs v. Pueblo Int'l, Inc.*, 823 F.2d 768, 773 (3d Cir. 1987). The court should order a new trial if "a miscarriage of justice would result if the verdict were to stand." *Delli Santi v. CNA Insurance Companies*, 8 F.3d 192, 201 (3d Cir. 1996) (quoting *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 211 (3d Cir. 1992)). Some courts have held that the verdict stands unless it "cries out to be overturned or shocks the conscience." *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344 (3rd Cir. 1991).

In reviewing a jury verdict, the court's "obligation is to uphold the jury's award, if there exists a reasonable basis to do so. . . . [A] court *may not* vacate or reduce the award merely because it would have granted a lesser amount of damages." *Motter v. Everest & Jennings, Inc.*, 883 F.2d 1223, 1230 (3d Cir. 1989) (emphasis in original). On a new trial motion, the court is permitted to consider the credibility of witnesses and to weigh the evidence, however the court must "exercise restraint to avoid usurping the jury's primary function." *Hurley v. Atlantic City Police Dept.*, 933 F. Supp. 396, 403 (D.N.J. 1996), *aff'd* 174 F.3d 95 (3d Cir. 1999), *cert. denied* 120 S. Ct. 786 (2000). Therefore, a judge's mere belief that the jury was unduly generous is not sufficient to warrant a new trial. *Dunn v. HOVIC*, 1 F.3d 1362, 1361 (3d Cir. 1993), *modified by* 13 F.3d 58 (3d Cir. 1993).

Based on the testimony discussed above, the Court finds that the verdict bears at least a rational connection to the evidence. Therefore, a new trial is not warranted.

III. CONCLUSION

For the foregoing reasons, Defendant's application for judgment as a matter of law, or in the alternative, a new trial denied.

An appropriate Order follows.

/s/ WILLIAM G. BASSLER
U.S.D.J.

Dated: March 1, 2004

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY GRANTING PREJUDGMENT INTEREST DATED JANUARY 30, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. 01-4893 (WGB)

DIMENSIONAL COMMUNICATIONS, INC.,

Plaintiff,

vs.

OZ OPTICS, LTD.,

Defendants.

OPINION AND ORDER

BASSLER, DISTRICT JUDGE:

At the conclusion of trial, the jury returned a verdict on December 17, 2003 awarding Plaintiff Dimensional Communications, Inc. ("Plaintiff") $492,766.01 in damages. Plaintiff now moves for prejudgment interest in the amount of $82,759.58. Plaintiff's application for prejudgment interest is **granted**, but **denied** insofar as it seeks annually compounded interest rather than simple interest.

I. BACKGROUND

Plaintiff filed this action on October 22, 2001, alleging that certain monies were due and owing based on a

contractual agreement between the parties involving the construction of a trade show exhibit booth. After a dispute arose between the parties regarding the scope of the agreement and the basis for certain costs, Defendant OZ Optics, Ltd. ("Defendant") refused to tender payment for services that it deemed excessive and outside the scope of the parties' agreement. In turn, Plaintiff seized the trade show booth pending full payment of the disputed sums.

Although Plaintiff's claim for damages against Defendant totaled $534,810.92[1], the jury's verdict was for 92% of the monies it sought. Thus, Plaintiff now seeks annually-compounded prejudgment interest on 92% of the amount of each invoice owed by Defendant at New Jersey's postjudgment interest rate commencing on the date of each invoice.[2]

II. DISCUSSION

A. *Whether Prejudgment Interest Should Be Awarded*

In diversity actions, the forum state's law governs the award of prejudgment interest. *See W.A. Wright, Inc. v. KDI*

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1. This number was based on the following: (1) six unpaid invoices for services and merchandise dated May 23 through August 3, 2001 totaling $490,635.42; and (2) seven unpaid quarterly invoices for storage charges dated April 10, 2001 through October 16, 2002 and non-invoiced storaged charges for 2003 for a total of $44,175.50. All of the invoices indicated that they were due upon receipt. *See* Invoices attached as Ex. A to December 29, 2003 Certification of Timothy J. O'Neill, Esq.

2. *See* n.4, *infra*.

Sylvan Pools, Inc., 746 F.2d 215, 219 (3d Cir. 1984); *Interfaith Community Org. v. Honeywell Int'l, Inc.*, 263 F. Supp.2d 796, 859 (D.N.J. 2003). Under New Jersey law, New Jersey Court Rule 4:42-11 expressly governs the rate on judgments in tort actions. For contract claims, however, prejudgment interest may be awarded in the discretion of the court and in accordance with equitable principles. *See Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557, 574 (3d Cir. 1998); *De Puy Inc. v. Biomedical Engineering Trust*, 216 F. Supp.2d 358, 380 (D.N.J. 2001). The equitable purpose of awarding prejudgment interest is to compensate the claimant for the loss of earnings on the money if payment had not been delayed. *See De Puy Inc.*, 216 F. Supp. at 380; *Unihealth v. U.S. Healthcare, Inc.*, 14 F. Supp.2d 623, 642 (D.N.J. 1998). "Prejudgment interest 'is not meant to be punitive, but rather, it is a payment for the use of money.'" De *Puy Inc.*, 216 F. Supp.2d at 380 (citing *Sulcov v. 2100 Linwood Owners, Inc.*, 303 N.J. Super. 13, 39 (App. Div. 1997)).

Here, Defendant contends that the equities weigh against awarding prejudgment interest because Plaintiff has improperly retained Defendant's trade show exhibit booth and several of Defendant's plasma televisions as security for the monies Defendant owes. The value of such retained property, Defendant claims, approaches that of the verdict obtained by Plaintiff.

Moreover, Defendant also alleges that Plaintiff has given no indication that it intends to return these items to Defendant, and that Plaintiff is enjoying the possession of use of Defendant's property. On this basis, Defendant

concludes that Plaintiff has "unclean hands," and therefore, it would be "grossly" inequitable for this Court to award prejudgment interest.

In response, Plaintiff correctly points out that the jury rejected Defendant's claim that Plaintiff's possession of Defendant's trade show exhibit was improper or unauthorized. Specifically, the jury found that Plaintiff was entitled to nearly all of the monies that Defendant refused to pay, and although Defendant argued that it was entitled to damages as a result of Plaintiff's possession of the exhibit, the jury refused to reduce Plaintiff's recovery on that basis.

As further argued by Plaintiff, Defendant has provided no support for its conclusory assertion regarding the value of the trade show exhibit.

Moreover, according to Plaintiff, there was undisputed trial testimony that as soon as it receives payment from Defendant for the amounts due, it will return the exhibit to Defendant. In fact, Plaintiff claims it is eager to turn over the exhibit once Defendant pays what it owes. Plaintiff also argues that far from "enjoying" possession and use of Defendant's property, the exhibit is taking up space in its storage facility and is a costly burden to continue to store without receiving any storage fees.

Given these circumstances, the Court finds that the equities weigh in favor of granting prejudgment interest to Plaintiff.

Finally, although it is impossible to determine the amount of each invoice that the jury awarded to Plaintiff, because the jury awarded 92% of the monies Plaintiff sought, Plaintiff argues that it would be fair to calculate interest based on 92% of the amount of each invoice. Defendant has raised no objection to this method of calculating interest. Accordingly, prejudgment interest will be awarded on 92% of the amount of each invoice.

B. *Date From When Interest Is To Run*

According to Plaintiff, the prejudgment interest should begin to run on the date that the injured party lost the use of its funds. Because all of the invoices indicated that they were due upon receipt, Plaintiff contends that three days from the date of each invoice to allow for mailing time, should be the date that interest begins to run. In support of its position, Plaintiff relies on *Matter of Bankers Trust Co. v. Bethlehem Steel Corp.*, 658 F.2d 103 (3d Cir. 1981) and *Interfaith Community Organization v. Honeywell Int'l, Inc.*, 263 F. Supp.2d 796 (D.N.J. 2003).

In contrast, Defendant insists that interest should begin to run on each invoice 6 months after the invoice date in accordance with New Jersey Court Rule 4:42-11(b).[3]

3. R. 4:42-11(b) provides in part:

> Except where provided by statute with respect to a public entity or employee, and except as otherwise provided by law, the court shall, in tort actions, . . . include in the judgment simple interest, calculated as hereafter provided, from the date of the institution of the action or from a date 6 months after the date the cause of action arises, whichever is later . . ."

Appendix C

To support its position, Defendant looks to *Blakely v. Continental Airlines, Inc.*, 2 F. Supp.2d 598, 609 (D.N.J. 1998). R. 4:42-11(b), however, provides for the methodology and calculation of prejudgment interest applicable in tort actions and *Blakely* was a tort action. Because *Blakely* does not address how prejudgment interest should be calculated in contract actions, *Blakely* is not instructive here.

Next, Defendant argues that both cases relied on by Plaintiff, *Matter of Bankers Trust* and *Interfaith*, are inapplicable because unlike the present matter, those cases involved situations in which property was put out of service. In so arguing, Defendant cites to *BP Exploration & Oil, Inc. v. Moran Mid-Atlantic Corp.*, 147 F. Supp.2d 333, 346 (D.N.J. 2001), where the court noted that in cases involving property that is put out of service, "interest should be allowed from the date of the accident to compensate for the deprivation of use of property."

While the court in *BP Exploration* did note the distinction between the accrual of prejudgment interest on property that *is not* put out of service and property that *is* put out of service, the court began its analysis by citing to *Matter of Bankers Trust* for the general principle that "[p]rejudgment interest begins to run from the date the damaged party loses the use of its *funds*." *BP Exploration*, 147 F. Supp.2d at 346 (emphasis added).

In *Matter of Bankers Trust*, 658 F.2d at 112, the court based its holding in connection with prejudgment interest on the principle that prejudgment interest "is allowable only from the date of the loss of use of the claimant's investment

or funds." Similarly, in *Interfaith*, 263 F. Supp.2d at 859, the court recognized that "[p]rejudgment interest begins to run from the date on which the damaged party loses the use of its funds—i.e. from the time the expenditures were made."

Finally, allowing prejudgment interest to begin running from the date that the injured party lost the use of its funds is in keeping with the equitable purpose of awarding prejudgment interest to compensate the claimant for the loss of earnings on the money if payment had not been delayed. *See* discussion *supra*. Accordingly, in the interest of equity, because all of the invoices indicated that they were due upon receipt, and it is unknown when Defendant received each invoice, interest shall begin to run three days after the date of each invoice to allow for mailing time.[4]

C. *Interest Rate*

"Pursuant to New Jersey law, the rate at which prejudgment interest is calculated is within the discretion of the court." [citation omitted]. The rate applied in New Jersey to postjudgment interest pursuant to New Jersey Court Rules

4. With respect to the non-invoiced storage charges for 2003, *see* n.1 *supra*, Plaintiff calculated the date upon which interest should begin to run by taking the average number of days after the beginning of each previous quarter that the storage invoices were dated (15) and adding three days to adjust for mailing time for a total of 18 days. Accordingly, Plaintiff contends that the dates upon which interest should begin to run for the 2003 storage charges are January 18, April 18, July 18, and October 18, 2003. Defendant has not opposed this calculation. Therefore, with respect to the 2003 non-invoiced storage charges, interest is to commence on these dates as proposed by Plaintiff.

4:42-11(a)(ii) generally provides an appropriate benchmark. [citations omitted]." *De Puy Inc.*, 216 F. Supp. at 381 n.22; *see also Liberty Lincoln-Mercury*, 134 F.3d at 574. For judgments greater than $15,000, the New Jersey postjudgment rates for 2001-2003 are 7.5%, 8%, and 5%, respectively. *See* 2004 N.J. Lawyer's Diary at 84; N.J. Ct. Rule 4:42-11(a). Defendant does not dispute that if prejudgment interest is awarded, the rate provided for in Rule 4:42-11 should govern here.

The parties, however, disagree on whether the prejudgment interest should be annually-compounded interest or simple interest. Plaintiff argues that compounded interest is equitable in this case because it more fairly compensates Plaintiff for the loss of income the money would have earned if Defendant had not delayed payment. In support of its contention that the interest should be compounded, Plaintiff cites as an example, *Fuji Photo Film Co. Ltd. v. Jazz Photo Corp.*, 249 F. Supp.2d 434, 459 (D.N.J. 2003).

In *Fuji Photo*, which involved claims for patent infringement, although the court did order that prejudgment interest be compounded annually at the statutory rate provided for in R. 4:42-11, it did so without stating any rationale for its deviation from the simple interest authorized in R. 4:42-11(b). Thus, Defendant argues that if the Court awards any prejudgment interest, simple interest, as provided for in R. 4:42-11(b),[5] should apply.

The Court agrees with Defendant. Notwithstanding what was done without any explanation in *Fuji Photo*, the Court

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5. *See* n. 3, *supra.*

finds that awarding simple interest adequately compensates Plaintiff for the loss of earnings on the money if payment had not been delayed by Defendant.

III. CONCLUSION

For the foregoing reasons, Plaintiff's application for prejudgment interest is **granted**, but **denied** insofar as it seeks annually compounded interest rather than simple interest. Accordingly, prejudgment interest on 92% of each invoice is to be calculated on simple interest starting from three days after each invoice date.

Plaintiff's counsel is directed to prepare a judgment in conformity with this Opinion and Order and forward it to Defense counsel for consent as to form.

So Ordered.

/s/
WILLIAM G. BASSLER, U.S.D.J.

Dated: January 30, 2004

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 19, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

01cv4893 (WGB)

DIMENSIONAL COMMUNICATIONS, INC.

plaintiff,

vs.

OZ OPTICS, LTD.

defendants

JUDGMENT

This action came on for trial before the Court and a jury,

Honorable William G. Bassler, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is on this 19th day of December 2003,

Ordered and adjudged that a Judgement be entered in favor of plaintiff Dimensional Communications and against defendant Oz Optics, LTD., in the amount of **$492,766.01**.

Appendix D

Further ORDERED that counsel shall move for prejudgment interest by way of motion no later than 31 December 2003 with opposition to motion filed by 14 January 2004.

s/ William G. Bassler
William G. Bassler, U.S.D.J.

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED OCTOBER 9, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

01 Civ. 4893 (WGB)

DIMENSIONAL COMMUNICATIONS, INC.,

Plaintiff,

vs.

OZ OPTICS, LTD.,

Defendant.

OPINION

BASSLER, DISTRICT JUDGE:

This matter comes before the Court on the appeal of Defendant OZ Optics, Limited ("OZ" or "Defendant") from Magistrate Judge Madeline Cox Arleo's Order of July 15, 2003, denying Oz's motion to amend its answer to assert a counterclaim.

For the following reasons, Judge Arleo's Order is **affirmed**.

Appendix E

I. BACKGROUND

Plaintiff Dimensional Communications, Inc. ("DCI" or "Plaintiff") filed this action on October 22, 2001, alleging that certain monies were due and owing based on a contractual agreement between the parties involving the construction of a trade show exhibit booth. After a dispute arose between the parties regarding the scope of the agreement and the basis for certain costs, OZ refused to tender payment for services that it deemed excessive and outside the scope of the parties' agreement. In turn, DCI seized the trade show booth pending full payment of the disputed sums. Although OZ claimed a right to an offset for monies arising out of DCI's custody of the trade show booth as an affirmative defense, it did not make an affirmative claim premised on the seizure.

The deadline for filing motions to amend the pleadings was set for December 31, 2002. The discovery cut-off date, originally set for February 28, 2003, was extended to April 15, 2003, although some discovery did continue through May 2003.

On or about May 16, 2003, OZ moved for leave to amend its answer to assert a counterclaim for conversion of the trade show booth. By Order filed on July 15, 2003, Judge Arleo denied OZ's motion to amend on two separate and independent grounds. First, she found that Defendant failed to meet Fed. R. Civ. P. Rule 16(b)'s "good cause" standard because it waited five months after the deadline to seek to add its counterclaim despite having the relevant knowledge

to do so since the time it filed its answer. Specifically, Judge Arleo stated:

> While the defendant asserts that the proposed conversion claim was already asserted as the setoff defense and no additional discovery is necessary, these assertions equally suggest that OZ had full knowledge of the relevant facts required to assert the counterclaim and failed to do so in a timely manner.

(Court Decision Tr. 3:14-19, attached as Ex. B to Blau Cert.).

Second, Judge Arleo denied Defendant's motion to amend under Fed. F. Civ. P. 15(a), finding that (1) Defendant exhibited undue delay and dilatory motive in failing to timely assert its proposed counterclaim despite having the knowledge to do so since the time it filed its answer; and (2) further delay and prejudice could result if DCI were to file a motion for summary judgment in connection with the newly asserted counterclaim. (*Id.* at 4:1-5:10).

On July 16, 2003, OZ retained new counsel as a result of an alleged breakdown of attorney/client communications over a period of several months.

With new counsel, OZ now appeals Judge Arleo's Order denying its motion for leave to amend its answer. Since the filing of this appeal, a trial date has been tentatively scheduled for November 12, 2003.

Appendix E

II. DISCUSSION

A. *Standard of Review*

In reviewing a magistrate's decision, the Court shall "set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law." L. Civ. R. 72 (c) (1) (A); *see* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); *see also Haines v. Liggett Group, Inc.*, 975 F.2d 81, 92 (3d Cir. 1992).

As interpreted by the Supreme Court, the clearly erroneous standard is met "when although there is evidence to support [a decision], the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948); *accord Haines*, 975 F.2d at 92.

B. *Rule 16(b)*

Fed. P. Civ. P. 16(b) provides that a court's scheduling order "shall not be modified except upon a showing of good cause and by leave of the judge or, when authorized by a local rule, by a magistrate judge."

OZ suggests, however, that Judge Arleo misapplied the law because in ruling on a motion to amend filed after the scheduling order deadline, Rule 16(b)'s "good cause" standard should be weighed against "the interest of justice" and the "liberal pleading rules of Rules 13 and 15. *See* Def.'s Br. In Support of Appeal, at 11. In advocating a type of balancing test approach, OZ claims that any delay and potential prejudice is outweighed by the fact that it has acted

in good faith, its counterclaim is meritorious, and that because its proposed counterclaim is compulsory, it may lose its right to assert its claim if not permitted to do so here.[1]

However, the express language of Rule 16 clearly requires a showing of "good cause" to warrant an amendment of a scheduling order. In *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463 (D.N.J., 1990), a case heavily relied on by OZ, the court stated:

> To argue that there should be a liberal policy of freely permitting amendments is to ignore, in an old case such as this one, the purposes of case management and the scheduling orders which "are at the heart of case management." Koplove v. Ford Motor Co., 795 F.2d 15, 18 (3d Cir.1986). The 1983 amendments to the Federal Rules of Civil Procedure were enacted specifically to require "judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps." Fed.R.Civ.P. 16, Advisory Committee's Note on 1983 amendment. The modification of a scheduling order deadline requires "a showing of good cause if it cannot reasonably be met despite the diligence of the

1. The Court notes that the denial of a motion to amend to add a counterclaim, even a compulsory one, is within the discretion of the Magistrate. *See Aerotech Resources, Inc. v. Dodson Aviation, Inc.*, 2001 WL 474302, at *5 (D. Kan. April 23, 2001) (noting that compulsory nature of claim raised "is only one of the factors the court must consider when exercising its discretion to allow amendments to pleadings").

> party seeking the extension." Id., note on Subdivision (b). *The careful scheme of reasonable framing and enforcement of scheduling orders for case management would thus be nullified if a party could inject amended pleadings upon a showing of less than good cause after scheduling deadlines have expired.*

Id. at 469 (emphasis added). Indeed, as acknowledged by OZ, *Harrison Beverage* "made clear that . . . Rule 16 should play an important role in deciding an out-of-time motion to amend." Def.'s Br. In Support of Appeal, at 11; *see Eastern Minerals & Chemicals Co. v. Mahan*, 225 F.3d 330, 340 (3d Cir. 2000)(finding that trial court acted "well within its discretion" when it denied motion to amend based upon finding that plaintiff had not met Rule 16(b) standard).

Moreover, allowing Rule 15 (a) to essentially water down or trump Rule 16(b) would effectively change the standard to require something less than good cause, if not render Rule 16(b) virtually meaningless. *See Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000) ("[D]espite the lenient standard of Rule 15(a), a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause"); *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998) (per curiam) ("[i]f we considered only Rule 15(a) without regard to Rule 16(b), we would render scheduling orders meaningless and effectively would read Rule 15(b) and its good cause requirement out of the Federal Rules of Civil Procedure."); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610

(9th Cir. 1992) ("Disregard of the [scheduling] order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier. Rule 16 was drafted to prevent this situation[,] and its standards may not be short-circuited by an appeal to those of Rule 15.").

Thus, this Court concludes that Judge Arleo's application of Rule 16's good cause standard without combining it with Rule 15(a)'s standard was not clearly erroneous or contrary to law.

Moreover, Judge Arleo's conclusion that OZ failed to establish good cause is not clearly erroneous or contrary to law.[2] In reaching that determination, Judge Arleo noted that, without any reasonable delay or explanation, OZ had belatedly sought to add its counterclaim despite having the relevant knowledge to do so since the time it filed its answer. *See Eastern Minerals & Chemicals Co.*, 225 F.3d at 340 (finding that district court acted properly when it denied motion to amend filed six months after the amendment deadlines had passed based on finding that good cause had

2. As pointed out by OZ, in *Harrison Beverage*, the defendant was permitted to assert two of its proposed affirmative defenses, and in *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 2003 WL 21649311 (D.N.J. July 14, 2003), the district court upheld the Magistrate Judge's decision to grant the defendant's motion to amend its counterclaim. However, the fact that two other district courts may have reached a different conclusion under the specific facts of the cases before them is not a basis for this Court to conclude that Judge Arleo's findings are clearly erroneous. Moreover, the decisions of other district courts in the Third Circuit are not binding on this Court.

not been established, where movant had not specified what led it to decide that additional claim could not have been previously pled or why information from independent sources could not have been obtained earlier); *see also Parker*, 204 F.3d at 340-41 (finding absence of "good cause" where plaintiff had all the necessary information to support its proposed new claim at the time of commencement of action); *Sosa*, 133 F.3d at 1419 (finding no good cause where party failed to discover necessary information and was on notice in advance of the deadline that her complaint was inadequate).

OZ now argues to this Court that its failure to timely seek to add its counterclaim was a result of excusable neglect or inadvertence by its former counsel. OZ also suggests that its "prior breakdown of attorney/client communications" is a sufficient basis to find that the Magistrate Judge clearly erred in finding that "good cause" did not exist.

OZ's attempt to use prior counsel as a basis to overturn Judge Arleo's decision, however, is without any factual support. Attributing OZ's failure to timely seek to file its proposed counterclaim on the negligence or inadvertence of former counsel is suspect in view of the fact that OZ does not deny that it had full knowledge of the relevant facts required to assert the counterclaim in a timely manner.

Moreover, the untimely motion to amend its answer does not appear to have resulted from the alleged "breakdown" in communications between OZ and its prior counsel. In OZ's initial application to amend made to the Magistrate Judge, prior defense counsel explained that "[a]pproximately a

month or two after the deadline to file amended pleadings had passed, my client discussed with me not only defenses but a Counterclaim." Epstein Decl. At ¶ 6, attached as Ex. I to the Barna Cert.

Thus, Judge Arleo's factual findings are not clearly erroneous or contrary to law.

C. *Rule 15(a)*

OZ does not argue that Judge Arleo acted improperly by applying the standard of Fed. R. Civ. P. Rule 15(a); rather, OZ maintains that under the liberal standards of that rule, its motion to amend should have been granted.

"Federal Rule of Civil Procedure 15(a) provides that 'leave [to amend) shall be freely given when justice so requires.'" *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997) (quoting *Glassman v. Computervision Corp.*, 90 F.3d 617, 622 ((1st Cir. 1996)) (change in original). The Third Circuit has noted that courts "have shown a strong liberality . . . in allowing amendments under Rule 15(a)." *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989) (citations omitted) (internal quotation marks omitted). Although "the grant or denial of an opportunity to amend is within the discretion of the District Court, . . . outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of that discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *accord In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1434. "Among the

grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1434 (citing, *inter alia*, *Foman*, 371 U.S. at 182).

Here, Judge Arleo's denial of OZ's motion to amend was not without any justifying reason. She determined that OZ had exhibited undue delay and dilatory motive in seeking to add a counterclaim, having found that "the client [OZ] knew about the facts upon the basis of the proposed counterclaim since the time the defendant filed its answer but chose not to assert it in the form of a counterclaim." Court Decision Tr. 4:11-14.

Moreover, as recognized by OZ, Judge Arleo also suggested that delay and prejudice would result if Plaintiff were to bring a motion for summary judgment in connection with the newly asserted counterclaim. *See, e.g. Tiernan v. Blyth, Eastman, Dillon & Co.*, 719 F.2d 1, 4-5 (1st Cir. 1983) (noting that late amendment would cause prejudice even where additional discovery was unnecessary and where new theories were based on same facts in original complaint; new claims "may well have affected defendants' planned trial strategy and tactics" and would likely have "required additional time to prepare for trial.")

Having found undue delay, dilatory motive, and prejudice, under the clearly erroneous standard, the Court must affirm Judge Arleo's decision to deny OZ's motion to leave to amend its answer-to assert a counterclaim of conversion.

Appendix E

D. *Rule 13(f)*

OZ acknowledges that its former counsel did not invoke Rule 13 in support of its initial moving papers before Magistrate Judge Arleo. Therefore, it will not be considered. *See Koch Materials Co.*, 2003 WL 21649311, at *5 (refusing to consider argument that was not raised before the Magistrate Judge) (citing *Reich v. Hercules, Inc.*, 857 F. Supp. 367, 369 (D.N.J. 1994)); *Lithuanian Commerce Corp.*, 177 F.R.D. at 210-11 (same); *Health Corp. of America v. New Jersey Dental Assoc.*, 77 F.R.D. 488, 491 (D.N.J. 1978) ("Since this argument [that denial of amendment to assert omitted counterclaim might foreclose assertion of such claims] was not presented to the Magistrate for his consideration before decision, the court will not consider it now. A contrary result would increase, rather than alleviate, the burden of the trial judge in pre-trial matters.")

III. *CONCLUSION*

For the foregoing reasons, the Court is not left with the impression that a mistake has been committed. Judge Arleo's July 15, 2003 Order denying OZ's motion for leave to amend its answer to assert a counterclaim is **affirmed.** Defendant's appeal is dismissed.

s/ William G. Bassler
William G. Bassler, U.S.D.J.

Dated: 10/9/03

APPENDIX F — ORDER DENYING MOTION TO AMEND OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED OCTOBER 9, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

01 Civ. 4893 (WGB)

DIMENSIONAL COMMUNICATIONS, INC.,

Plaintiff,

vs.

OZ OPTICS, LTD.,

Defendant.

ORDER

This matter having come before the Court on the appeal by Defendant OZ Optics, LTD of a July 15, 2003 Order of the Honorable Madeline Cox Arleo, United States Magistrate Judge, which denied Defendant's motion for leave to amend its answer to assert a counterclaim; and

The Court having considered submissions of the parties; and

The Court having decided this matter without oral argument pursuant to Fed. R. Civ. P. 78; and

Appendix F

For the reasons set forth in the Court's Opinion filed this day; and

For good cause shown;

It is on this 9th day of October, 2003 ORDERED that Judge Arleo's Order filed July 15, 2003 is **affirmed**;

IT IS FURTHER ORDERED that Defendant's appeal of Judge Arleo's Order is **dismissed**.

s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

APPENDIX G — MAGISTRAGTE JUDGE ORDER DENYING LEAVE TO FILE COUNTERCLAIM OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED JULY 15, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION

CASE NO. CV01-4893 (WGB)

DIMENSIONAL COMMUNICATIONS, INC.,

Plaintiff,

v.

OZ OPTICS, LTD.,

Defendant

ORDER

THIS MATTER having been brought before the Court on motion of defendant OZ Optics, Ltd., by and through its counsel, Post, Polak, Goodsell, MacNeill & Strauchler, P.A., (David L. Epstein, Esq. appearing), and on notice to plaintiff, Dimensional Commmunications, Inc., by and through its counsel, Windels, Marx, Lane & Mittendorf, LLP (Jennifer Barna, Esq. appearing); and the Court having considered the papers submitted in support of and in opposition to said motion; and the Court having heard argument of counsel in open Court on June 17, 2003; and for good cause set forth on the record;

Appendix G

IT IS on this 15 day of July 2003, ORDERED as follows:

1. Defendant's motion for leave to file a counterclaim is hereby DENIED.

2. A true and correct copy of this Order shall be served upon counsel for defendant within 5 days of the date of plaintiff's counsel receives the executed copy hereof.

s/ Madeline Cox Arleo
Honorable Madeline Cox Arleo, U.S.M.J.

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED SEPTEMBER 13, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1817

DIMENSIONAL COMMUNICATIONS, INC.

v.

OZ OPTICS, LTD.,

Appellant

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, and VAN ANTWERPEN *Circuit Judges* and POLLAK, *District Judge**

The petition for rehearing filed by Appellant Oz Optics, Ltd. in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the

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* Hon. Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation, as to panel rehearing only.

other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ Dolores K. Sloviter
Circuit Judge

Dated: September 13, 2005